149 US 779

RECORD, CASE No. 13,575.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 374. 56

GEORGE LEGG, PLAINTIFF IN ERROR,

vs.

EDWARD L. HEDDEN, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 20, 1889.

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Certiorari	5	2
Complaint	7	3
Bill of particulars	9	5
Answer	11	6
Minutes of trial, &c.	13	7
Judgment	14	7
Bill of exceptions	16	8
Statement of case	16	8
Protest	18	9
Judge's certificate to bill of exceptions	20	10
Assignment of errors	21	10
Joinder in error	23	11
Bond	25	11
Citation	27	12
Proof of service of citation	28	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1892.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between George Legg, plaintiff in error, and Edward L. Hedden, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
E. HENRY LACOMBE.

[Endorsed:] E. & A. A. 833. 11026. Supreme Court of the United States. George Legg, plaintiff in error, *vs.* Edward L. Hedden, defendant in error. Writ of error. Charles Curie, attorney for plaintiff in error. A copy of the within paper has been admitted at this office. May 25, 1889. Stephen A. Walker, U. S. attorney, attorney for defendant in error. [Stamped:] U. S. circuit court. Filed May 25, 1889. John A Shields, clerk. 1.45, ch.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from

three to twenty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George Legg, plaintiff in error, against Edward L. Hedden, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this nineteenth day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

GEORGE LEGG, Plaintiff,
against
EDWARD L. HEDDEN, Defendant. } Summons No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, June 1st, 1886.

CHAS. CURIE,
Plaintiff's Attorney,
Office, No. 44 Exchange Place, New York City.

4 [Endorsed:] 11026. No. 1. N. Y. superior court. George Legg, plaintiff, against Edward L. Hedden, defendant. Summons. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Received, U. S. attorney's office, Jun 3, 1886. Due service hereof admitted this 1st day of June, 1886.

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We for certain reasons being desirous that our circuit court of the United States for the southern district of New York, [L. S.] in the second circuit, shall be certified of a certain cause commenced before you against Edward L. Hedden, defendant, by George Legg, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 21 day of June, 1886, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 16 day of June, in the year one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

6 [Endorsed:] 11026. U. S. circuit court. George Legg *vs.* Edward L. Hedden. Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, June 16, 1886. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To C. C., plaintiff's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, June 16, 1886. Chas. Curie, plaintiff's attorney.

7 Circuit Court of the United States for the Southern District of New York.

GEORGE LEGG, Plaintiff,
against
EDWARD L. HEDDEN, Defendant. } Complaint.

Plaintiff complains—

1st. That defendant was during the time hereinafter named collector of customs of the United States at the port of New York.

2d. That plaintiff was during said times in trade under the firm name of Straus, Legg & Co., and as such duly imported and entered at the port of New York. the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiff as and for duties thereon and plaintiff, in order to obtain said goods, was compelled to pay and did pay the sum of eleven thousand one hundred & fifty-nine $\frac{60}{100}$ dollars in excess of the amount required by law.

4th. That plaintiff filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiff made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury and of his decision thereon,

together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiff and is still due and owing to him.

Wherefore plaintiff demands judgment against defendant for eleven thousand one hundred & fifty-nine $\frac{60}{100}$ dollars, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiff.

8 [Endorsed:] 11026. U. S. circuit court. George Legg, plaintiff, against Edward L. Hedden, defendant. Complaint. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Received, U. S. attorney's office, Jun- 30, 1886.

Name of importer, Straus, Legg & Co.

		Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.	
					1885.	1885.		1885.	1885.	1885.	1886.	
	1	Feather frimmings	Hamburg	Lessing	June 27	July 14	488 10	July 14	Aug. 12	Aug. 12	M'ch 4	13804
	2	"	"	Rugia	July 11	" 28	373 80	" 28	" 26	" 26	" 4	14469
	3	"	Bremen	Fulda	" 23	Aug. 10	157 80	Aug. 10	Sept. 7	Sept. 7	" 27	14981
	4	"	Hamburg	Bohemia	" 4	July 22	295 50	July 22	Oct. 12	Oct. 12	" 4	16804
	5	"	Bremen	Elbe	Aug. 21	Sept. 5	1,069 00	Sept. 5	" 21	" 21	" 13	17368
	6	"	"	Werra	Sept. 17	" 28	56 30	" 28	Nov. 2	Nov. 2	No ans. rec'd.	18132
	7	"	"	Eider	" 5	" 21	394 40	" 21	" 6	" 6	Dec.1,'86	18282
159	8	"	"	Elbe	" 18	Oct. 5	516 60	Oct. 5	" 14	" 14	None	18866
	9	"	"	Ems	" 27	" 10	1,140 20	" 10	" 21	" 21	....do.....	19279
	10	"	"	Eider	Oct. 4	" 19	1,940 60	" 19	" 21	" 21		
	11	"	"	Werra	" 11	" 24	714 30	" 24	Dec. 3	Dec. 3	None	19923
	12	"	"	Elbe	" 17	Nov. 2	1,732 00	Nov. 2	" 11	" 11	M'ch 13	20425
	13	"	"	Fulda	" 23	" 5	736 00	" 5	" 11	" 11	" 13	"
	14	"	"	Ems	" 25	" 7	1,535 00	" 7	" 18	" 18	" 13	20942
	15						11,159 60					

10 [Endorsed:] 11026. U. S. circuit court, southern district of New York. George Legg against Edward L. Hedden. Bill of particulars. New York, June 30, 1886. To Stephen A. Walker, Esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Chas. Curie, plaintiff's attorney, 44 Exchange place, New York city. Received, U. S. attorney's office, June 30, 1886.

11 Circuit Court of the United States for the Southern District of New York.

GEORGE LEGG & *al.*
versus
E. L. HEDDEN, Collector, etc. } 11026.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiffs was compelled to pay or did pay to the defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests, as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And, further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And, further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And, further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon or within ninety days after payment of duties paid thereon after such decision.

VIII. And, further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And, further answering, the defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him, in his capacity as collector of customs, as and for duties due the United States on imported merchandise and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And, further answering, the defendant alleges that all moneys

received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from the plaintiffs to the United States as duties, according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

12 [Endorsed:] 11026. U. S. circuit court, southern district of New York. George Legg & *al. vs.* E. L. Hedden, collector, etc. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, May 18, 1887. Chas. Curie, plaintiffs' attorney. To C. Curie, Esq., plaintiffs' attorney.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 30th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable E. Henry Lacombe, circuit judge.

GEORGE LEGG
vs.
EDWARD L. HEDDEN. } 11026.

Now comes the plaintiff, by Stephen G. Clarke, his attorney, and moves the trial of this cause.

Likewise comes the defendant, by William Wickham Smith, assistant United States attorney, his attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

Afterwards, to wit, on the 31st day of January instant, after hearing the evidence of the respective parties, the argument of counsel, and the instructions of the court, the jury retire under charge of officers duly qualified to attend them, and upon their return, on the *the* 4th day of February instant, say that they find a verdict for the defendant, and so they say all.

An abstract from the minutes.

JOHN A. SHIELDS, *Clerk.*

14 United States Circuit Court, Southern District of New York.

GEORGE LEGG
vs.
EDWARD L. HEDDEN. } Judgment, May 22, 1889.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury, at a circuit court of the October

term, 1888, and the issues having been tried and a verdict for the defendant having been duly rendered on the 31st day of Jan'y, 1889, and his costs having been adjusted at $54.85:

Now, on motion of Stephen A. Walker, United States attorney, for defendant,—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $54.85, his taxed costs, and have execution therefor.

Judgment signed this 22 day of May, 1889.

JOHN A. SHIELDS, *Clerk.*

15 [Endorsed:] # 11026. United States circuit court. George Legg *vs.* Edward L. Hedden. Judgment-roll. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed May 22, 1889, 2 p. m. John A. Shields, clerk.

16 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of New York.

GEORGE LEGG, Plaintiff, *against* EDWARD L. HEDDEN, Defendant. } Plaintiff's Bill of Exceptions. Cal. No., 1699. N. S. 11026.

This cause came on for trial at the October term, 1888, of said court, before Hon. E. Henry Lacombe, the circuit judge, and a jury, on the thirtieth and thirty-first days of January, 1889. The plaintiff appeared by Charles Curie, his attorney, and Stephen G. Clarke and Edwin B. Smith, of counsel, and the defendant by Stephen A. Walker, United States attorney, and his assistant, William Wickham Smith.

In the course of the trial the plaintiff, by his said attorney and counsel, took and alleged sundry exceptions to the rulings and direction and instructions of the court and to the refusals to instruct and direct, and these exceptions *and* hereinafter severally set forth.

Under the tariff of March 3, 1883, the plaintiff imported into New York the goods mentioned in his complaint and bill of particulars, which he testified were a new article of manufacture, first known or made about 1885, and which were by other testi-

17 mony shown to be a new article of importation. In appearance and use it is similar to fur, and was employed for muffs, trimming cloaks, etc. It was made out of "downs" (as found by the special verdict of the jury), the witnesses who testified as to their origin saying they came from the turkey, glued or made to adhere to a cotton fabric, the downs being the component material of chief value.

Defendant's witnesses thus described the method of making plaintiff's importations: Turkey feathers were cleaned or washed and dried, the soft portions cut off, dyed, and then fastened by some adhesive substance to the cotton cloth which constitutes the basis of the fabric. Certain of the plaintiff's samples, they said, were not dyed or colored, but were "natural color."

The defendant, then collector of the port of New York, assessed duty upon these importations at fifty per centum ad valorem, under the clause of the act of March 3, 1883, providing a substitute for title thirty-three of the Revised Statutes, sec. 2503, Schedule N, "Sundries," on—

"Feathers of all kinds, crude or not dressed, colored or manufactured, twenty-five per centum ad valorem; when dressed, colored or manufactured, including dressed and finished birds, for millinery ornaments, and artificial and ornamental feathers and flowers, or parts thereof, of whatever material composed, for millinery use, not specially enumerated or provided for in this act, fifty per centum ad valorem."

18 Against this exaction the plaintiff seasonably protested and appealed, paying the duty demanded under such protest and to obtain his goods:

"Hon. Edward L. Hedden, collector of customs, New York.

SIR: We hereby protest against your decision and assessment of duties as made by you on our importations below mentioned, consisting of certain feather trimmings other than millinery, composed of crude feathers or downs fastened with a gluish substance on strips of cotton cloth, imitating fur, feathers the comp. mat. of ch. val., claiming said goods are not manf'd feathers in the meaning of the law and are dutiable, first, as a non-enumerated manf. under sec. 2513, act M'ch 3, '83, at only 20% ad val., or, second, at only 25% as a manf. of which crude feathers or downs are the comp. mat'ls of ch. val., under sec. 2499 and Sch. 'N' of said act, or, third, at only 30% under said sec. & sch. as imitation of fur, or, fourth, at no more than the highest rate chargeable on any of its component parts, viz., cotton cloth, under Sch. 'I,' said sec. of said act, and not at 50% ad val. as manf'd feathers or as charged by you; and we give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the

19 difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury under the rules of your office to be an appeal to him from your decision and to likewise apply to all future similar importations by us.

CHARLES CURIE,
Attorney for George Legg, 44 Exchange Place, N. Y."

The collector having exacted duty upon the article under the above-quoted clause as a manufacture of feathers, it was submitted to the jury to find whether, according to the sample proved in the case, it was made of feathers or downs, and a special verdict was returned that the sample was made of downs; thereupon the plaintiff's counsel moved the court to direct a verdict in his favor. The judge refused the request thus made in behalf of the plaintiff, and the plaintiff excepted.

20 The assistant United States attorney moved to have a verdict directed for the defendant. The court granted the motion and directed a verdict for the defendant; to which the plaintiff excepted.

A verdict in accordance with such direction was returned.

And because none of the said exceptions so offered and made to the opinion, rulings, decisions, and direction and refusal to direct of the court appear upon the record of the said trial, therefore, upon the prayer of the plaintiff, by his counsel, the said judge has signed and sealed this bill of exceptions *nunc pro tunc* as of the said thirty-first day of January, 1889.

E. HENRY LACOMBE.

I consent to the above being signed as the bill of exceptions herein.

Dated New York, May 14th, 1889.

STEPHEN A. WALKER, *U. S. Att'y.*

(Endorsed:) N. S. 11026. U. S. circuit court, southern dist. of New York. George Legg *vs.* Edward L. Hedden. Plaintiff's bill of exceptions. Charles Curie, plaintiff's attorney, 44 Exchange place, N. Y. city. U. S. circuit court. Filed May 14, 1889. John A. Shields, clerk.

21 Supreme Court of the United States.

GEORGE LEGG, Plaintiff in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Charles Curie, (his) attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing,

and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

CHARLES CURIE,
Att'y for Pl'ff in Error.

22 [Endorsed:] 11026. United States Supreme Court. George Legg, plaintiff in error, *vs.* Edward L. Hedden, defendant in error. Assignment of error. Charles Curie, attorney for plaintiff in error. A copy of the within paper has been this day received at this office. May 25, 1889. Stephen A. Walker, U. S. attorney. U. S. circuit court. Filed May 25, 1889. John A. Shields, clerk.

23 Supreme Court of the United States.

GEORGE LEGG, Plaintiff in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Stephen A. Walker, U. S. att'y, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendant in Error.

24 [Endorsed:] 11026. United States Supreme Court. George Legg, plaintiff in error, *vs.* Edward L. Hedden, defendant in error. Joinder in error. Stephen A. Walker, U. S. att'y, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 27th day of May, 1889. ——— ———, attorney for plaintiff in error. To Chas. Curie, attorney for plaintiff in error. U. S. circuit court. Filed May 27, 1889. John A. Shields, clerk.

25 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

GEORGE LEGG
vs.
EDWARD L. HEDDEN. } Bond for Damages and Costs. | 11026.

Know all men by these presents that we, James Demarest, of New York city, & Chas. H. Asche, of said city, are held and firmly bound unto the above-named Edward L. Hedden in the sum of two hundred and fifty dollars, to be paid to the said Edward L. Hedden; for the payment of which, well and truly to be made, we bind ourselves

and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 18 day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named George Legg has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named George Legg shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his said *said* writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES DEMAREST, [L. S.]
3 *Hanover St.*
CHAS. H. ASCHE, [L. S.]
3 *Hanover St.*

Sealed and delivered and taken and acknowledged this 18 day of May, 1889, before me—
[L. S.] JOS. W. MASTERS.

26 [Endorsed:] 11064. U. S. circuit court, southern district of New York. George Legg *vs.* Edward L. Hedden. Bond for costs on writ of error. Approved as to form, amount, and sufficiency of sureties. May 24, 1889. E. Henry Lacombe. U. S. circuit court. Filed May 24, 1889. John A. Shields, clerk.

UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

James Demarest & Chas. H. Asche, both of the city of New York, being duly sworn, do depose and say that each of them is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAS. DEMAREST,
3 *Hanover St.*
CHAS. H. ASCHE,
3 *Hanover St.*

Sworn to this 18 day of May, A. D. 1889, before me—
[L. S.] JOS. W. MASTERS.

27 UNITED STATES OF AMERICA, *ss:*

To Edward L. Hedden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York,

wherein George Legg is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated May 24th, 1889.

E. HENRY LACOMBE.

28 [Endorsed:] 11026. U. S. Supreme Court. George Legg, plaintiff in error, against Edward L. Hedden, defendant in error. Citation. Charles Curie, attorney for plaintiff in error. A copy of the within paper has been this day received at this office. May 25, 1889. Stephen A. Walker, U. S. attorney. U. S. circuit court. Filed May 25, 1889. John A. Shields, clerk.

Endorsed on cover: Case No. 13,575. S. New York C. C. U. S. No. 374. George Legg, plaintiff in error, *vs.* Edward L. Hedden, late collector of the port of New York. Filed June 20, 1889.

Office Supreme Court U. S.
FILED.
OCT 10 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

GEORGE LEGG

vs.

EDWARD L. HEDDEN.

No. 50.

BRIEF FOR PLAINTIFF.

EDWIN B. SMITH,
No. 120 BROADWAY,
New York,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

GEORGE LEGG vs. EDWARD L. HEDDEN.	No. 50.

PLAINTIFF'S BRIEF.

Statement.

Under the tariff of March 3, 1883, the plaintiff imported into New York the goods mentioned in his complaint and bill of particulars, which he testified were *a new article of manufacture*, first known or made about 1885, and which were by other testimony shown to be a new article of *importation*. *In appearance and use it is similar to fur*, and was employed for muffs, trimming cloaks, etc. It was made out of "downs" (as found by the special verdict of the jury), the witnesses who testified as to their origin saying they came from the turkey, glued or made to adhere to a cotton fabric, the *downs being the component material of chief value*. (Rec. 8, fols. 16, 17.)

Defendant's witnesses thus described the method of making plaintiff's importations; Turkey feathers were

cleaned or washed and dried, the *soft portions cut off*, dyed, and then fastened by some adhesive substance to the cotton cloth which constitutes the basis of the fabric. Certain of the plaintiff's samples, they said, were not dyed or colored, but were "natural color" (Record, 8, fol. 17).

The defendant, then collector of the port of New York, assessed duty upon these importations at fifty per centum *ad valorem*, under the clause of the Act of March 3, 1883, providing a substitute for title thirty-three of the Revised Statutes, Sec. 2503, Schedule N, "Sundries," on—

"Feathers of all kinds, crude or not dressed, colored or manufactured, twenty-five per centum *ad valorem;* when dressed, colored or manufactured, including dressed and finished birds, for millinery ornaments, and artificial and ornamental feathers and flowers, or parts thereof of whatever material composed, for millinery use, not specially enumerated or provided for in this act, fifty per centum *ad valorem*." (22 Stats. 512.)

Against this exaction the plaintiff seasonably protested and appealed, paying the duty demanded under such protest and to obtain his goods, the material part being as below :—

"Hon. Edward L. Hedden, Collector of Customs, New York.

"Sir: We hereby protest against your decision and assessment of duties as made by you on our importations below mentioned, consisting of certain feather trimmings other than millinery, composed of crude feathers or downs fastened with a gluish substance on strips of cotton cloth, imitating fur, feathers the comp. mat. of ch. val., claiming that said goods are not manf'd. feathers in the meaning of the law and are dutiable, first, as a non-enumerated manf. under sec. 2513, act M'ch. 3, '83, at only 20% ad val., or, second, at only 25% as a manf. of which crude feathers or downs are the comp. mat'ls. of ch. val., under sec. 2499 and Sch. 'N' of said act, or, third, at only 30% under said sec. & sch. as imitation of fur, or, fourth, at no more

than the highest rate chargeable on any of its component parts, viz., cotton cloth, under Sch. 'I', said sec. of said act, and not at 50% ad val. as man'f'd. feathers or as charged by you; and we give notice, etc., etc." (Rec. 9.)

The collector having exacted duty upon the article under the above-quoted clause as a manufacture of feathers, it was submitted to the jury to find whether, according to the sample proved in the case, it was made of feathers or downs, and a special verdict was returned that the sample was made of DOWNS; thereupon the plaintiff's counsel moved the court to direct a verdict in his favor. The judge refused the request thus made in behalf of the plaintiff, and the plaintiff excepted. (Rec. 10, fol. 19.)

The assistant United States attorney moved to have a verdict directed for the defendant. The court granted the motion and directed a verdict for the defendant; to which the plaintiff excepted. (Rec. 10, fol. 20.)

A verdict in accordance with such direction was returned. (*Ib.* and 7.)

Judgment was entered for defendant upon this verdict. (*Ib.* 7, 8.)

Assignment of Errors.

The plaintiff in error assigns for error,

1st. The failure to direct and enter judgment for the plaintiff upon and in accordance with the special verdict, finding the chief component of plaintiff's importations to be 'downs,' and not 'feathers.' (Rec. 8, fol. 17; 10 top; 8 top.)

2d. The refusal to direct a verdict in favor of the plaintiff, as requested in his behalf. (Rec. 10, top.)

3d. The directing of a verdict in favor of the defendant. *(Ib.)*

4th. The verdict returned in accordance with such direction. (Rec. 10, fol. 20.)

5th. The judgment in favor of the defendant, entered upon the verdict so directed and returned. (Rec. 788.)

Statutes.

In order to show "the state of the art" of tariff designation, with relation to "feathers" and "downs," we deem it useful to subjoin a collection including every provision relating to either of these articles, from the earliest to the latest tariff.

The Act of 1792, c. 27, Sec. 1, dutied

"hats, caps and bonnets of every sort; * * * millinery ready made; *artificial flowers, feathers and other ornaments* for women's head-dresses; * * * ten per centum *ad valorem*."

1 U. S. Stats., 260, top.

By the general clause of the first Tariff Act all articles not enumerated were dutiable at 5%. (*Id.*, 26.)

By Act of June 7, 1794, c. 54, Sec. 1, an additional 5 per cent was placed upon

"millinery ready made, artificial flowers, *feathers and other ornaments* for women's head-dresses, and on dolls dressed and undressed," etc. (*Id.*, 391.)

This is the applicable clause of Act of April 27, 1816 c. 107, Sec. 1:

"A duty of 30 per cent. *ad val.* on * * * bonnets and caps for women, fans, *feather ornaments* for head-dresses, artificial flowers, millinery of all sorts." (2 Stats. 311, Paragraph fifth.)

The Act of July 14, 1832, c. 227, Sec. 2, Paragraph twenty-first:

"On the following articles, 25 per cent. *ad val.* * * * fans, artificial flowers, *ornamental feathers*, ornaments for head-dresses, caps for women, and millinery of all kinds." (4 Stats., 589, mid.)

The twenty-fourth paragraph of the same section, placed 15% upon

"hair bracelets, hair *not made up for head-dresses* * * * *down of* ALL *kinds*, feathers *for beds*". (*Id.*, 590, top).

The Act of Aug. 30, 1842, c. 270, paragraph

"TENTH. On all *ornamental* feathers and artificial flowers, or parts thereof, *of whatever material* composed, hair bracelets, chains, ringlets, curls or braids, human hair, cleaned and prepared for use, and on fans of every description, 25% *ad val.* * * * on feathers *for beds*, and *downs* of *all* kinds, 25% *ad val*". (5 Stats., 555).

This tariff imposed 20% *ad val.*, on all non-enumerated articles. (*Id.*, 561, Sec. 10). It was the first time (we think) they were dutied so high. It was retained in the Act of July 30, 1846, c. 74, Sec. 3. (9 Stats., 43, top).

Schedule C of this last-named act put 30% upon

"feathers and flowers, artificial or ornamental, AND PARTS THEREOF, *of whatever material* composed." (*Id.*, 45, near mid.)

Schedule D of this act placed 25% upon

"feather beds, feathers for beds, and *downs of all kinds.*" (*Id.*, 46, mid.)

This left feathers, neither ornamental nor for beds, at 20%, *as non-enumerated.*

The act of March 3, 1857, c. 98, Sec. 1, reduced the rates of the above-mentioned Schedules, and fixed that upon non-enumerated articles at 15%. (11 Stats. 192.)

The twentieth section of the act of March 2, 1861, c. 68, levied twenty per cent. upon

"feather beds, feathers for beds, and *downs of all kinds.*" (12 Stats., 189.)

and 30% upon

"feathers and flowers, artificial or ornamental, *and parts thereof, of whatever material* composed." (*Id.* 192, top.)

This tariff first made the distinction, as to non-enumerated articles, between those manufactured and those unmanufactured. (*Id.*, 196, Sec. 24.)

The act of July 14, 1862, c. 163, to *temporarily* increase duties, contained, in its eighth section, this provision:—

240. On feathers and *downs for beds* or bedding, of all descriptions, thirty per centum *ad valorem;*"

"On ostrich, vulture, cock, and other ornamental feathers, crude or not dressed, colored, or manufactured, twenty per centum *ad valorem;* when dressed, colored, or manufactured, forty per centum *ad valorem;*"

"On feathers and flowers, artificial and parts thereof, of whatever material composed, not otherwise provided for, forty per centum *ad valorem.* (12 Stats., 551.)

The act of June 30, 1864, c. 171, "to increase duties," etc., raised it 5% on the crude "ostrich, vulture, cock and other *ornamental* feathers;" and ten per cent. on *such* feathers, dressed, etc.;—but it did *not* increase it upon any *other* feathers; nor upon downs; nor on non-enumerated articles. (13 Stats., 213.)

The act of June 6, 1872, c. 315, places upon the Free List "Bed feathers and *downs.*" (17 Stats., 234.)

This brings us to the revision, which is a reproduction of existing laws, as it was designed.

"Feathers; ostrich, vulture, cock, and other *ornamental*, crude or not dressed, colored, or manufactured; twenty five per centum *ad valorem;* when dressed, colored, or manufactured; fifty per centum *ad valorem.* Artificial and ornamental feathers and flowers, or parts thereof, of whatever material composed, not otherwise provided for: fifty per centum *ad valorem.*"

"Feather beds: twenty per centum *ad valorem.*"

R. S. (2d. ed.) p. 475, bottom.

Upon the Free list, Sec. 2505, are "Bed feathers and downs." (*Id.* 483.)

The Act of March 3, 1883, c. 121, retains upon the Free List, under the sub-title "Sundries," "Bed feathers and *downs.*" (22 Stats., 518).

Our goods were imported, after this act took effect and the Collector dutied them under this paragraph, (Heyl, 429) from Schedule N, "Sundries:"

"Feathers of all kinds, crude or not dressed, colored or manufactured, twenty-five per centum *ad valorem*; when dressed, colored or manufactured, including dressed and finished birds, for millinery ornaments, and artificial and ornamental feathers and flowers, or parts thereof, of whatever material composed, for millinery use, not specially enumerated or provided for in this act, fifty per centum *ad valorem.*" (22 Stats., 512.)

In the Act of October 1st, 1890 Congress recognized the well-known distinctions and nomenclature of trade and of common life (which the Court below, in its direction against us, ignored) and provided *specifically* for articles which were not *so* provided for in preceding legislation, but had been left to come in under general provisions and *omnium* clauses.

443. Feathers and downs of all kinds, crude or not dressed, colored or manufactured, not specially provided for in this act, ten per centum *ad valorem;* when dressed, colored or manufactured, including quilts of down and other *manufactures of down*, and also including dressed and finished birds suitable for millinery ornaments, and artificial and ornamental

feathers and flowers, or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum *ad valorem*. (26 Stats. 600.)

This act places upon the Free List

567. Feathers and downs for beds. (*Id.* 605, bottom.)

The section the latter clause of which the decision of this Court (Hartranft v. Sheppard, 125 U. S. 337) establishes as applicable to plaintiff's importations reads as amended by the Act of 1883, thus:—

SEC. 2513. There shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum *ad valorem; and all articles manufactured*, in whole or in part, *not herein enumerated or provided for, a duty of twenty per centum ad valorem.*" (22 Stats. 523.)

POINTS.

The foregoing statutory summary shows our tariff legislation to have always made a distinction, as to feathers, with reference to their *use*, whether for millinery or other purposes: also, that the *specified* uses are for headdresses and beds;—feathers for *other* uses coming in as non-enumerated.

In the tariff of 1832 (*ante*, p. 5 top) and in every subsequent one, the distinction between down and feathers has been legislatively recognized; as it had been, immemorially, before that in the language of common life, and in the transactions of commerce.

Our right to recover exists independently of this dis-

tinction—and whether the article used in the make-up of our goods is really feathers or downs; or that *portion* of a feather which is called down;—but, as the jury found the *fact* to be that downs were used, we will first discuss the nature of this distinction, and to what extent the fact so found entitles us to recover.

I.

Feathers and Downs.

It is immaterial what the distinction is between feathers and downs; no matter if down is merely a particularly soft fluff or flue of a feather;—for, whatever the distinction may be, and however narrow, the jury determined the fact, that the constituent of our importations comes within it, as downs, and not feathers. (Rec. 10 top.)

Uncontradicted by us, defendant's witnesses said the material used was "*the soft portions*" of clean turkey-feathers, glued to cotton cloth, either in their natural color, or after *these portions* had been dyed. (Rec. 8 bottom.)

Down principally comes from the breast of birds; being defined by Webster as the *hairy* growth *under* the feathers; by Worcester as "*fine* feathers;" and by McElrath as "the fine, short breast plumage of the eider-duck and other birds. In this, the last two follow McCulloch who calls it "the fine feathers from the breast of several birds, particularly those of the duck kind."

In ordinary speech there is unconscious recognition of this distinction of a peculiar softness of the plumage covering those parts of the bird most exposed and most needing protection.

The second lecture of Prof. John Mason Good's second series is "On the Distinctive Character of Animals." He observes:

"But we must hasten in our rapid career to the Bird Class, distinguished by having the body covered with feathers *and down*."

1 Book of Nature, 323.

Of its constant use in literature, as indicating a substance distinguished from all other feathers (if you please) by its quality of peculiar lightness and softness, examples might fill a volume.

We recall the old hymn-line;—"Soft as downy pillows are."

Shakespeare's comparisons often speak of it as "soft," "light and weightless down," etc.; and, in the second scene of the third act of Anthony and Cleopatra, "the swan's *down feather*, that stands upon the swell, at full of tide."

Similar distinctions in articles of a common origin, but discriminated from each other in commercial and common speech by separate names, because of the absence or possession of certain qualities of softness, malleability, etc., have frequently been observed in our tariff legislation.

Wool and worsted. Elliot v. Swartwout, 10 Pet., 137.
Wool and shoddy. Seeberger v. Cahn, 137 U. S., 95.
Silk v. crêpe. Arthur v. Morrison, 96 *Id.*, 108.
Iron and Steel. (See every tariff passed.)
Animal and birds. Reiche v. Smythe, 13 Wall., 162.

That, under the statute here in question, quilts (or anything else) made chiefly of down, combined with cotton or silk, are dutiable as non-enumerated manufactured articles, at 20%, under Sec. 2513, as amended by the act of 1883, *precisely as set forth in the first*

specification of claim in our protest (Rec. 9, middle; and *ante*, p. 2 bot.) has been declared by this Court, in an opinion prepared by the late Chief-Justice, affirming the judgment of the Circuit Court in Philadelphia, and which fully and precisely covers the present case, and supports our contention.

Hartranft v. Sheppard, 125 U. S., 337.

II.

Distinction immaterial here.

Our indubitable right, claimed by us, to enter our goods at 20% under section 2513, vindicated by the foregoing decision (125 U. S. 337) was denied us. Why, this record does not indicate. We can conjecture it was because our protest, while stating every material *fact*, did not set forth the *law*, that downs were on the free list;—a circumstance which, in law and fact was not of the slightest consequence, so long as manufactures of down (or of feathers) were not *enumerated* for duty.

Reserving to the future any criticism of any such view of our protest, we now observe that no determination of the issue submitted to the jury (actually decided in our favor) would have justified the action of the collector or of the court in this case. Had the special verdict found that *feathers* (and not downs) were the component of chief value in our goods, this would not have authorized the imposition of the duty placed thereon, nor of any other than such as we claimed in our protest.

So far as the question of levying duty was concerned, the actual distinction, recognized commercially and

commonly, between feathers and downs, was immaterial.

As matter of *law*, the act of 1883 placed no duty upon manufactures OF feathers, *eo nomine*: as matter of *fact*, our goods were, in no just sense, manufacturers of feathers; but, as our protest truly states (Rec. 9, fol. 18, *ante*, p. 2) were a *composite* article, made in part from feathers, (to wit, that portion of feathers known as 'downs') glue, or some adhesive substance, whereby the feather downy part was secured to strips of cotton cloth, to imitate *fur*, for which it is a cheap substitute. (Rec. 8, fol. 17; *ante*, p. 2 bottom.)

It was no more a manufacture of feathers than of cotton, except that the value of the feathers employed in the making exceeded that of the cloth. *(Ib.)*

If we disregard the cloth and glue, that does not justify the duty imposed by the collector; for there is no 50% duty upon feathers thus manipulated and used.

The clause upon which the collector based his assessment (Rec. 9 top; *ante*, p. 7) places upon feathers of all kinds, imported in their crude state, *as feathers*, twenty-five per centum; and when they have been *so* dressed, colored or manufactured as (without loss of their identity *as feathers*) to be ready, like finished birds, *for millinery ornaments* (and for no other use) then—and not until then—they are assessable at the rate of fifty per centum. *(Ib.)*

It may be noted, *en passant*, that this clause puts the same rate upon artificial and ornamental feathers for millinery use, and upon "*parts* thereof" for such use. *(Ib.)*

Analysis of this clause demonstrates its entire inapplicability to our importations, wholly irrespective of whether their animal part was feather or down.

It discriminates between crude feathers of all kinds and feathers dressed for millinery ornaments (only) or which, being either artificial or naturally ornamental, were intended for millinery use, and no other; and

places parts of these latter upon the same basis as the whole feather or flower, *when designed for this use*, and not otherwise. *(Ib.)*

Use is made the determining element of dutiable character.

Hartranft v. Langfeld, 125 U. S. 28.
Robertson v. Edelhoff, 132 *Id.* 615.
U. S. v. Nichols, 46 F. R. 359.

If a person chooses to use a crude, undressed feather to adorn his or her hat, this does not affect the duty thereon; because they are not commercially considered to be generally available for this purpose. They pay 25 per cent., whatever their use.

But if, when unfit crude, they are made ornamental and adapted to millinery adornment by dressing, coloring, or being otherwise manufactured, they are to pay twice that duty, in common with feathers naturally ornamental, or artificially fabricated for that use.

It is the feather "manufactured," so as to fit it for this use, and not a manufacture of some other article out of feathers, (in whole or in part) that is here dutied at fifty per centum.

In our manufacture, it was the *cloak-trimming*, and not the feather, that was "manufactured." To make this "new article of manufacture" and of importation, "first known or made about 1885," in imitation of fur, and used for muffs, cloak-trimmings, etc., the feather employed was destroyed. (Rec. 8, fols. 16, 17; *ante*, pp. 1 and 2.)

The article did not come in subject to several duties; on its cotton constituent the cotton-rate, and on its feathery portion, a feather rate. It came in as a distinct entity; distinguished in character, use, and duty from either component.

This statute dutied "bonnets," etc., *eo nomine*. Those brought in decorated with feathers, flowers, or birds, were subject to forty per centum of their market value,

so trimmed or ornamented; and not to a separate duty at one rate upon the bonnet and another upon its trimming or ornamentation.

Our article, first devised in 1885, could not be specifically mentioned in the Act of 1883; but that did not make it any the less dutiable according to its actual character and condition than a bonnet, which was mentioned.

This "new article of manufacture" (Rec. 8, fol. 17), the collector must examine, or cause to be examined, so soon as it becomes "a new importation." *(Ib.)* He ascertains that, to make it, feathers or downs, or parts thereof, are glued to cotton cloth. It is to be used as a cheap substitute for fur. They call it 'feather trimmings.' In the act of 1883, there is no nomination of any such article of commerce. Turning to its enumerative clauses, none is found to apply; there is no enumeration of manufactures of feathers (even if that term would apply) and in those of cotton, that fibre must be exclusive, or the component of chief value. (Arthur v. Herman, 96 U. S. 142 bottom.) Nor is it dutiable according to composition, under this act of 1883 (though it would have been under the prior law as partly of cotton, the material paying the highest rate), because its chief component is not, *as an ingredient of further manufacture*, subject to duty, whether we call that component feather or down. Nor is it free, for cotton, at least, is not. Hence, it cannot be otherwise dutied than, according to the actual fact, as a new, non-enumerated, manufactured article; at 20%, under sec. 2513. It is equally so dutiable, whether we call the feathery constituents 'feathers' or 'downs.'

Hartranft v. Sheppard, 125 U. S. 337.

That the name 'feather trimmings' was assigned to this new manufacture is immaterial, except as it may have been one source of confusion.

Meyer v. Arthur, 91 U. S. 577.

III.

Sufficiency of Protest.

The equity of this case is entirely with the plaintiff.

Under the above-cited decision (125 U. S. 337) it is, and was conceded to be, beyond controversy that our goods were properly only dutiable at twenty per centum, under R. S. sec. 2513 (Act of 1883), according to the first claim of our protest (Rec. 9, fol. 18 ; *ante*, p. 2 bot.), and that we are legally entitled to the thirty-per-cent. difference between that rate and the one imposed by the collector, *provided* our protest is sufficient to protect us from the illegal exaction against which we protested.

This was expressly stated by Judge LACOMBE orally, no written opinion having been filed.

Legg v. Hedden, 37 Fed. Rep. 863.

While the sufficiency of our protest to relieve us of the extortion of which we complained was thus the only subject of doubt, examination, and adverse determination in the court below, yet we have considered it best to approach this topic through the preceding statement and analysis of the evidence and of the Statutes ; because it is necessary first to understand to what state of facts, and to what course and status of legislation—and, especially, to what existing statute—the protest referred. Without full knowledge of these, no correct conclusion could be reached as to its sufficiency. It was not, *per se*, a complete history of the entry, but merely a portion of its history.

In view of the proven facts and legislation, this protest was sufficient in law.

Last term's reiteration (in Heinze v. Miller, 144 U. S. 28) of the numerous earlier decisions of this court therein cited (at p. 37) upon the subject of protests must establish the sufficiency of ours, in the present case.

Reference to that case and others, in connection with this, shows the too-technical views to which Judge LACOMBE'S acute mind inclined, upon his valued accession to the bench: an error subsequently corrected by him, in later cases, long before Heinze's case was reached and determined here.

In our Heinze brief, we invited the attention of the court to the statutory phraseology (R. S. § 2931) as attributing finality to the collector's decision *only* "as to the RATE and *amount* of duties—the amount being merely a mathematical computation, after the rate is determined by the collector and the value by the appraiser, etc. If dissatisfied with this decision (as to rate and amount) the importer must give the statutory notice, "setting forth therein distinctly and specifically the grounds of his objection THERETO," etc. (R. S. Sec. 2931, reproducing 13 Stats. 215 top.)

It is *thereto*—to that decision, as to rate, etc.—that the objections must be distinct and specific.

We will not here further rehearse that brief; but notice that the test to be applied to a protest has repeatedly been thus declared;—whether the objection set forth therein to the decision of the collector

"was so distinct and specific as, when fairly construed, to show that the objection taken at the trial was in the mind of the importer, and was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one that could be obviated."

Heinze v. Arthur, 144 U. S. 34.
Schell v. Fauche, 138 *Id.* 568.
Arthur v. Morgan, 112 *Id.* 501.
Davies v. Miller, 130 Id. 288.
Swanson v. Morton, 1 Cust. C.C. 296.

Apply this touchstone. A new importation presents itself at the custom-house, in appearance *like* fur, but not that. *Nullum simile est idem.* The collector finds it is compounded of cotton-cloth and feathers. He assesses it at 50% "*as a manufacture of feathers*," as

the record states, page 10 top. (*Ante*, p. 7) No clause of the tariff so duties such manufacture. That rate (as already noted—*ante*, p. 2) is imposed upon certain feathers when dressed or 'manufactured' to adorn the head. The *rate* was what concerned us. If he would let them in free, or at the 20% duty, he might call them whatever he pleased. What we had to tell him, and most distinctly did tell him, was that we were, and *why* we were, dissatisfied as to the *rate* his decision assigned.

We told him that our feather trimmings were "*other* than millinery;" (Rec. 9, fol. 18; *ante*, p. 2) that they were "composed of crude feathers or downs, fastened with a gluish substance on strips of cotton cloth, imitating fur;" (*Ib.*) that "feathers"—necessarily importing *such* feathers "or downs," *so used*—were "the component material of chief value."

We told him also, negatively, that they were "*not* manufactured feathers," within the meaning of the clause he applied to them.

These statements indicated *facts* which fully substantiated our claim that his decision was not warranted by law.

"The importers were bound *only* to state, as they did, that the rate of fifty per cent. was illegal, and why it was illegal."

Heinze v. Arthur, 144 U. S. 34 top.
Nichols U. S. 7 Wall, 130.

It was superfluously that we added our claim that "said goods are not manufactured feathers, in the meaning of the law, and are dutiable, FIRST, *as a non-enumerated manufacture, under Section 2513*, act of March 3, 1883, at only twenty per cent. *ad valorem*," etc., etc. *(Ib.)*

In the conclusion of our protest (not reprinted in this brief) we declared our specifications to be no waiver of any further ground for refund beside those mentioned; "intending this protest to be made *against the present*

duty, [*rate*] *charged upon said goods*," etc. (Rec. 9, fol. 19.)

If there could be any doubt as to the nature of the merchandise on sight, our protest gave him notice of the constituents, and "brought into communication and intercourse by the act of entry of the import, opportunities for explanation were afforded" (138 U. S. 568, quoting 18 How. 417 top) "that he might ascertain the *precise* facts, and have an opportunity to correct the mistake" (144 U. S. 34, etc., etc.) of which we complained, and which it is now admitted actually occurred.

Reference to Judge LACOMBE's oral remarks (38 F. R. 863, ¶ 1.) shows him inclined to look with disfavor upon our case and protest because—when the collector had assessed this entirely new article with so heavy a rate, under a clause manifestly inapplicable—we did not, in the most glorious uncertainty of tariff law, pick out one clause as certainly covering it, with the liability of having to pay the enormous rate, which we were sure was wrong, if we made what was ultimately found to be a mistaken selection! But he could find no precedent for any such strictness, and therefore ruled against us upon another ground. (37 Fed. R. 863, § 1.)

This was, substantially, that our protest did not tell the collector the *law*, that downs were upon the free list! As we have noted (*ante*, pp. 11 to 14, division II) it was immaterial whether the chief component was feathers or downs, so long as it was *not* within the clause applied by the collector (as it confessedly was not) and was, as is now admitted, within Sec. 2513, as claimed by us.

The opening paragraph of the judge's statement of the second objection (sustained by him) to our protest clearly indicates the erroneous assumption which led to the direction of a verdict for the defendant.

He observes:—

"The position of the case is now (and of course that was the position of the case all the time) that the

article is not to be taken as enumerated in any of the sections preceding section 2513, *because its component of chief value is on the free list.* THAT *is the* ONLY *fact by reason of which it can be claimed that this was a non-enumerated article*, and therefore open to the operation of section 2513." (37 F. R. 863, § 2.)

THE CASE IS NOT, AND NEVER WAS, IN THE POSITION ABOVE ASSIGNED IT.

The very first claim of *our protest* was originally, and has been throughout, and is now, that these importations were dutiable under section 2513, *because neither the article itself, nor its component of chief value, are anywhere else, in this tariff, enumerated for duty.*

That downs are on the free list is an immaterial circumstance. *The duty would be just the same, if they were not there mentioned*, so long as they were nowhere else dutiably enumerated.

Downs and feathers, well known commonly and commercially, were severally specified, as free or dutiable, in former tariffs. Had downs been wholly omitted from this one, the "new manufacture" of which they are the essential constituent would have been dutiable under sec. 2513, precisely as we claim, *and upon the precise ground upon which our protest bases this claim.*

Protesting that the goods are "*not* manufactured feathers," we assert that they "*are* dutiable (first) *as a non-enumerated manufacture* under sec. 2513, act Mch. 3' 83, at 20% *ad val.*" (Rec. 9, fol. 18, middle.)

This "new manufacture" is non-enumerated, simply because it is *not* enumerated anywhere; neither by name, nor by chief component.

Judge LACOMBE was misled by the expression, toward the conclusion of the opinion of the late Chief Justice (in Hartranft v. Sheppard, 125 U. S. 338 bottom) that, as their chief component was free, the quilts there in question were non-enumerated manufactures, dutiable at 20% under section 2513, rather than at the higher rates exacted.

This was merely reasoning upon the law, which the collector and importer were alike bound to know, as applied to ascertained facts, and not something which had to be argued out in the protest. That document need not to be argumentative. It is sufficient for it to state that the assessed duty is illegal, "and *why* it is illegal," *i. e.*, that the article is *not* "feathers manufactured," etc. (144 U. S. 34 top.) We also told him how they were made, to confirm this statement. (Rec. 9, fol. 18.)

It is impossible, we think, to hold that the objection made by us *to the rate imposed by the collector* was not in the mind of the importer when he made his protest.

It was much more specifically presented than in Greeley v. Burgess, 18 Howard, 413; Boker v. Bronson, 4 Blatc. 472.

Judge LACOMBE'S ruling—that a protest against assessing gloves at 60 %, as of silk, whereas cotton was (and was stated to be) the chief component, was insufficient, and not specific, because it did not state the *fact* that the gloves were "made on frames," *that fact indicating the clause of the statute actually applicable*—was held erroneous at the last term of this court.

Heinze v. Arthur, 144 U. S. 28.

It was precisely the same habit of thought and train of reasoning which led to the error of which we complain in the present case.

In another recent opinion it was said;—

"In the case under consideration, the importer claimed in substance in his protest, that the duty of 24 % was excessive, and that the goods were liable only to a duty of 19 % 'as a manufacture of worsted.' His insistence upon classifying them as a manufacture of worsted indicated clearly that the objection was substantially to their classification as 'de laines.' [feathers manufactured]. We think the collector upon reading this protest could have no doubt in his mind that the intention of

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FILED.
DEC 14 1891
JAMES H. MCKENNEY.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 198.

HARRIET C. JONES AND FRANK C. JONES,
ADMINISTRATRIX AND ADMINISTRATOR, D. B. N. C. T. A.,
OF THE ESTATE OF GAZAWAY B. LAMAR,
Appellants,

vs.

ELIZA A. CUNNINGHAM,
JANE C. CUNNINGHAM,
CARO N. DUBIGNON,
GEORGIA G. LAMAR, AND
MARY L. LAMAR.

BRIEF OF SOLICITORS FOR APPELLANTS.

GEORGE A. MERCER,
EVARTS, CHOATE & BEAMAN,
Solicitors for Appellants.

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the importer was to object to the failure to classify the goods as a manufacture of worsted. [a non-enumerated manufacture.] Schell v. Fauche, 138 U. S. 568–9.

Nor is the ground of our objection *to the rate imposed* at all affected by the assertion that "feathers *or* downs" were glued to cotton strips to make the article. It was held of no consequence that a protest objected to the duty laid upon a carriage because it was '*personal* effects,' while found to be 'household effects.'

Arthur v. Morgan, 112 U. S., 501.

As an objection to and protest against the 50% exacted, and as establishing *its* illegality, *it was of no consequence whether it was feathers or downs that were cut up to make our article.*

The statement of the *grounds of dissatisfaction* was sufficient, *as an objection,* "to notify the collector of its true nature and character, to the end that *he might ascertain* the *precise* facts," etc. (144 U. S. 34, and other cases.)

In the foregoing discussion of the protest, we have followed the course of Judge Lacombe's oral remarks, although the *record* transmitted to this court does not indicate any alleged defect in our protest, nor any ground for his direction of a verdict against us.

Even a formal *opinion,* sent up with the transcript, is *no part of the record* (12 Wh. 117; 6 Wall. 148; 112 U. S. 506 top) but we have assumed the Attorney-General would here follow the line of Judge Lacombe's reasoning—although that line was badly broken in the Heinze and other cases.

But we wish emphatically to deny that the *report* of the trial below (probably furnished by our adversary to 37 F. R., 862) truly or fairly presents our position at the trial, or our present position.

EDWIN B. SMITH,
120 Broadway, New York,
Of Counsel.

Transcript

of

Record

854

149 U.S.

Supreme Court U. States

766 - 778